8-1800-17731-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Rate Appeal of Sholom Home East	**RECOMMENDATION ON MOTIONS FOR SUMMARY DISPOSITION**

The above-entitled matter is before Administrative Law Judge Linda F. Close on the motion of the Department of Human Services (the Department or DHS) for partial summary disposition and the cross motion of Sholom Home East (Sholom Home or Sholom) for summary disposition. On October 5, 2007, the ALJ heard oral argument on the motions. Erika S. Sullivan Assistant Attorney General, 445 Minnesota St. #900 St. Paul, MN 55101-2127, appeared on behalf of the DHS. Joel H. Jensen, Jensen Law Firm, Ltd., 5353 Gamble Dr. #125, Minneapolis, MN 55416, appeared on behalf of Sholom Home.

Following oral argument, it was agreed that the evidentiary hearing, which had previously been set for November 12, 2007, would be postponed until December 10-11, 2007. This was done to afford the Parties time to discuss settlement following receipt of this Recommendation.

Based on the record of the proceedings, including the memoranda and oral argument of counsel, the Administrative Law Judge respectfully RECOMMENDS:

1. That the Department's motion for partial summary disposition be GRANTED.

2. That the motion of Sholom Home for summary disposition be DENIED.

Dated this 22nd day of October 2007.

s/Linda F. Close
LINDA F. CLOSE
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Human Services (the Commissioner) will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Recommendations in this report. The parties have 10 calendar days after receiving this report to file Exceptions to the report. At the end of the exceptions period, the record will close. Parties should contact Kevin Goodno, Commissioner, Department of Human Services, 444 Lafayette Road, St. Paul, MN 55155, (651) 296-2701, St. Paul, MN 55101, to learn the procedure for filing exceptions or presenting argument.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Background

Minnesota nursing facilities that care for medical assistance recipients receive reimbursement for that care as provided by federal and state law.[1] Historically, DHS set the rate of reimbursement for nursing facilities in accordance with Rule 50, which required facilities annually to report costs upon which the reimbursement rate would be determined.[2] Beginning in 1995, the Legislature provided an "Alternative Payment System" (APS), which relieves participating facilities from reporting costs annually.[3] Instead, a facility's rate is established under Rule 50 for the first year. In subsequent years, the facility receives the same rate plus an inflation adjustment and an adjustment for any increased health department licensing fees.[4] Participation in APS is voluntary and is carried out through contracts between DHS and participating facilities.[5] Sholom Home has participated in APS since 1999.[6]

In 2000, the Legislature enacted changes to the bed licensure statutes to encourage facilities to reduce the number of nursing facility beds. The changes permit facilities to lay away beds for up to five years, during which time there are no licensing or surcharge fees for the beds on layaway.[7] Reimbursement changes were also made so as to allow both Rule 50 and APS facilities a rate increase for qualifying bed layaways.[8] Prior to 2000, this rate increase was

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1 *See* 42 U.S.C. § 1396a(a)(5); 42 C.F.R. § 431.10; Minn. Stat. § 256B.41-.50.
2 *See* Minn. R. § 9549.0010-.0080.
3 *See* Minn. Stat. § 256B.434.
4 Minn. Stat. § 256B.434, subd. 4 (c).
5 *See* Minn. Stat. § 256B.434, subd. 12.
6 Affidavit of James Newstrom ¶ 3.
7 *See* Minn. Stat. § 144.071, subd. 4(b).
8 *See* Minn. Stat. § 256B.431, subd. 30 (a), subd. 30 (b).

available only upon delicensure of beds in Rule 50 facilities.[9] The 2000 changes made a rate increase available also to APS facilities upon delicensure of beds.[10]

A facility that lays away or delicenses beds must use the space thereby made available in one of three ways: to reduce the number of beds per room; to provide more common space for the use of the facility; or to perform other activities related to the operations of the facility. If the facility does not do this, its property rate increase must be reduced. [11]

Facts

In 2000, Sholom Home had 285 licensed beds. That year, it began a series of layaways, transfers, and delicensures. By October 2002, it had 139 beds and 102 beds on layaway. Following a series of layaways and delicensures, Sholom Home requested and received increases in its payment rates.[12] In 2003, the facility delicensed 100 of the laid away beds, leaving the facility with 139 licensed beds.[13]

While Sholom Home was making changes in 2001 and 2002, the Department made inquiries about the facility's use of space made available through layaways and delicensures. A Department auditor toured the facility and met with its counsel and management. In August 2002, the auditor informed Sholom Home that its claimed use of storage space would be allowed. By letter, the auditor explained that facility space claimed as "vacant" was actually being used for some storage and would therefore be allowed. In addition, all claimed storage space was allowed. The reason given was that the facility was eligible to return to service all of the 102 beds that were then on layaway. This fact justified the facility in retaining a large amount of space for storage.[14]

After Sholom Home made the 2003 changes to the number of licensed beds, the Department notified the facility that a field audit would be conducted. In November 2003, an auditor toured the facility. The auditor found that 3,171 square feet of the facility was empty by virtue of the delicensures, and 10,314 square feet was being used for storage.[15] The auditor issued audit findings disallowing a rate increase based on the vacant space and reducing by one-half the storage space eligible for the increase.[16] These disallowances reduced

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[9] *See* Minn. Stat. § 256B.431, subd. 3a (c).
[10] *See* Minn. Stat. § 256B.431, subd. 30 (d)
[11] *See* Minn. Stat. § 256B.431, subd. 30 (h).
[12] Affidavit of Diane Krueger ¶ 3.
[13] Affid. of D. Krueger ¶ 6. Two beds remained on lay away.
[14] Affid. of D. Krueger ¶ 6, Ex. A. The Department had also discovered a technical error in a calculation during this time. The Department corrected the error, which resulted in a reduction of the rate. The facility agreed to this change, and it is not in issue. *See id.*
[15] Affid. of D. Krueger ¶ 6, Ex. B.
[16] Affid. of D. Krueger ¶ 6, Ex. C.

Sholom Home's rate by $1.40, effective February 1, 2003.[17] Sholom Home appealed the rate adjustment, resulting in this proceeding.

The Parties' Motions

The Department's motion is for partial summary disposition. It argues that, as a matter of law, Sholom Home is subject to a rate reduction based on its leaving vacant 3,171 square feet of space following its delicensure of beds. Sholom Home argues that the vacancy issue, as argued by the Department, entails disputed facts, and that the Department's summary disposition motion should therefore be denied.

Sholom Home's motion for summary disposition is more comprehensive. The facility argues that it is entitled to summary disposition because the statutes clearly provide for a rate increase following delicensure calculated in accordance with a statutory formula. Sholom argues that DHS has ignored the statutory mandate for APS facilities and substituted Rule 50 criteria in determining the rate adjustment. In addition, Sholom Home objects to the adjustment based on an alleged change in position by DHS between the time beds were laid away and after they were delicensed. Sholom Home further argues that DHS has, in essence, audited its historical costs in making the adjustment. It may not do this, Sholom Homes argues, because the statute exempts APS facilities from audits of historical costs. Finally, Sholom Home argues that DHS has unlawfully reduced Sholom Home's rates, which is not allowed under the statutes. The statues, it argues, provide only for rate increases, not decreases, following delicensure.

Standard For Summary Disposition

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[18] A genuine issue is one which is not sham or frivolous.[19] A material fact is a fact the resolution of which will affect the outcome of the case.[20] Where no factual disputes are raised, the resolution of which might clarify the application of law, summary judgment is proper.[21]

Here, both Parties ask the ALJ to interpret statutes in their favor. Interpretation of statutes is a question of law.[22] Rules of statutory construction require a court to look first at the specific statutory language and be guided by its

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[17] Affid. of D. Krueger ¶ 6, Ex. C. Minn. Stat. § 256B.431, subd. 30 (a) makes property payment rate increases effective on the first day of the month following layaway.
[18] *Sauter v. Sauter*, 244 Minn. 482, 70 N.W.2d 351, 353 (1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985).
[19] *A & J Builders, Inc. v. Harms*, 288 Minn. 124, 179 N.W.2d 98 (1970).
[20] *Zappa v. Fahey*, 310 Minn. 555, 556, 245 N.W.2d 258, 259-60 (1976).
[21] *Holiday Acres No. 3 v. Midwest Federal Savings & Loan Assn. of Minneapolis*, 308 N.W.2d 471, 480 (Minn. 1981).
[22] *McClain v. Begley*, 465 N.W.2d 680 (Minn. 1991).

natural and most obvious meaning.[23] When the language of a statute is unambiguous, the court must apply its plain meaning.[24] A statute is ambiguous only when the language is subject to more than one reasonable interpretation.[25] When the meaning of statute is doubtful, deference should be given to the construction placed upon it by the agency charged with its administration, especially when the agency's interpretation is a long-standing one.[26]

The Department's Summary Disposition Motion

The Department argues that post-delicensure space must be put to one of the three uses set forth in Minn. Stat. § 256B.431, subd. 30 (h). The permitted uses all further facility operations. If the property made available through layaways and delicensures is not so used, then the Department must reduce the property rate increase by a ratio of the unqualifying space to the total footage resulting from layaways and delicensure.

Following the delicensures, Sholom Home had in excess of 3,000 square feet of vacant space. The Department posits that, by definition, vacant space is not sued for facility operations. The ALJ agrees with the Department.

Section 256B.431, subd. 30 of the statutes provides for the calculation of rates following layaways and delicensure. Subparagraph (h) of subdivision 30 provides as follows:

> A facility that does not utilize the space made available as a result of bed layaway or delicensure under this subdivision to reduce the number of beds per room or provide more common space for nursing facility uses or perform other activities related to the operation of the nursing facility shall have its property rate increase calculated under this subdivision reduced by the ratio of the square footage made available that is not used for these purposes to the total square footage made available as a result of bed layaway or delicensure.

The ALJ concludes that subdivision 30 (h) requires a facility to make an affirmative use of space resulting from delicensure. The language of the statute is clear and unambiguous. A facility must "utilize" space, and it must do so through affirmative acts to "reduce," "provide," or "perform." A common sense

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[23] *Heaslip v. Freeman*, 511 N.W.2d 21, 22 (Minn. Ct. App. 1994), *rev. denied* (Minn. Feb. 24, 1994).

[24] *Current Technology Concepts, Inc. v. Irie Enterprises, Inc.,* 530 N.W.2d 539 (Minn. 1995); *see also*, Minn. Stat. § 645.16 (when words of a statute are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit).

[25] *American Family Ins. Group v. Schroedl,* 616 N.W.2d 273, 277 (Minn. 2000).

[26] *St. Otto's Home v. State, Dep't of Human Servs.,* 437 N.W.2d 35, 40 (Minn. 1989); *Krumm v. R.A. Nadeau Co.,* 276 N.W.2d 641, 644 (Minn. 1979).

reading of the statute compels the conclusion that leaving space empty does not "utilize" that space.

Sholom Home admits that, following delicensure, it left space vacant. It further admits that, even today, the amount of vacant space is nearly 3,200 square feet, which is actually slightly more than the amount found during the 2003 audit.[27] By definition, Sholom was not making an affirmative use of the space in 2003 and, by its own admission, still has roughly the same amount of vacant space. As a consequence of leaving space vacant, Sholom Home's property rate increase is subject to reduction using the ratio set forth in subparagraph (h) of subdivision 30, quoted above. That is what the Department concluded, and the ALJ agrees with that conclusion.

Sholom Home has asserted several arguments to rebut the Department's position. It argues that the November 2003 field audit yielded a "snapshot" of its space usage. In using this snapshot, the Department has unfairly and arbitrarily determined that 3,174 feet of space is vacant, according to Sholom. Sholom Home argues, in essence, that the Department must identify specifically what space is vacant and show that it has been vacant since the audit. However, Sholom Home's responses to requests for admission confirm that, even today, nearly 3,200 square feet of space is vacant.[28] Moreover, if the findings in November 2003 were really inaccurate, Sholom Home had ample opportunity to show the Department that its snapshot was inaccurate. It has not done so and instead has admitted that it has made no affirmative use of the space. Finally, Sholom's argument, if accepted, would allow a facility perpetually to avoid the consequences of leaving space empty through the simple ruse of continuously shifting vacancies from one area of the facility to another. Such a result makes no sense.

Sholom also argues that the statute does not really require affirmative use of property resulting from delicensure. It asserts that the intent of the statute is to preclude any double-dipping by a facility by converting space created by delicensure to an income-producing area, while still claiming a property rate increase. In support of this argument, Sholom Home references a June 2000 DHS Bulletin explaining the provisions of subdivision 30.[29] Sholom claims that the Bulletin interprets the law to prevent rate increases only as to property used to produce revenue. A fair reading of the entire Bulletin, however, disproves Sholom's claim. The Bulletin's reference to income-producing use of space made available through layaway is merely a single example of space not being utilized by the facility for nursing home operations. The Bulletin does not suggest that the sole example constitutes an exhaustive list.

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[27] *See* Second Affidavit of Diane K. Krueger, Ex. C.

[28] *See id.*

[29] Sholom Home East's Memorandum in Support of Summary Disposition, Ex. D. Exhibit D follows the Affidavit of Diane K. Krueger, but is not mentioned in the Affidavit.

Sholom Home also argues that the Department's audit findings are contrary to its history of allowing a property rate increase while beds were laid away storage space. The undisputed facts, however, show that the Department has maintained a consistent position as the facts have changed. In 2002, when Sholom Home had 102 beds on layaway, Sholom retained a significant amount of space for storage. Also, it characterized some space as being vacant during that time. When the Department audited the facility, it found that Sholom Home did not really have vacant space. What it had was storage space that was not completely full. In addition, the facility was then within the window of time when it could have returned the laid away beds to service. This fact justified allowing considerable storage space, since Sholom might want to re-utilize stored items if laid away beds were re-licensed. The language of the Department's audit letter is clear on these points.[30]

Contrary to Sholom's argument, the Department's interpretation has not changed. It is the facts that have changed. In 2002, the Department concluded that space characterized as vacant was not vacant. In 2003, the Department found space that was truly vacant. The amount of the vacant space is not materially in dispute.[31] Furthermore, in 2002, Sholom might have re-licensed laid away beds, thereby justifying a large amount of storage space. Once Sholom's laid away beds were no longer eligible to be re-licensed, its need for storage space arguably diminished. As discussed further below, the issue of storage space, unlike the issue of vacant space, presents fact questions for hearing.

Finally, Sholom asserts that the vacant space is being used affirmatively in that it is an integral part of the physical plant. Vacant space must be heated and cooled and otherwise maintained. Therefore, the vacant space actually is being used for an activity related to the operation of the facility, Sholom argues. The ALJ finds this argument reaches too far. The statute sets forth three methods of utilizing space made available because of delicensure. All three are stated in the affirmative: the facility must "reduce," "provide," or "perform." Leaving space empty entails no action at all. The statute contemplates affirmative conduct by the facility, and Sholom has not conducted any activity so as to satisfy the statute. As a result, the Department was correct to determine the rate increase following delicensure by reducing the increase in accordance with the ratio set forth in Minn. Stat. § 256B.431, subd. 30 (h).

Because there are no material facts in dispute relating to vacant space and the application of the law as interpreted is clear, the ALJ recommends that the Commissioner grant the Department's motion for summary disposition as to the issue of vacant space.

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[30] *See* Affid. Of D. K. Krueger, Ex. A.

[31] Sholom currently has somewhat more vacant space than it did at the time of the audit. The Department's lower audit figure for vacant space favors Sholom and is not significantly different. *See* Affid. of D. K. Krueger, Ex. B.

Sholom Home's Summary Disposition Motion

Sholom Home maintains that it is entitled to summary disposition for several reasons: the Department's audit is based on Rule 50 criteria, which are unlawfully being applied to an APS facility; the Department's change in statutory interpretation precludes the audit adjustments; the Department is statutorily barred from implementing a rate decrease; and the audit is arbitrarily and unlawfully fixed in time. The ALJ recommends Sholom's motion be denied as to each of these bases. The ALJ rejects the legal arguments posed by Sholom Home in support of its motion and finds that the issue of storage space presents fact issues for an evidentiary hearing.

Was the audit unlawfully based on Rule 50 criteria?

Sholom argues that, as an APS facility, it is exempt from an audit that applies general cost principles of Rule 50. Sholom asserts that the Department's audit essentially does this and is therefore unlawful. In support of its argument, the facility relies on the language of Minn. Stat. § 256B. 434, subd. 10, which provides:

> [An APS] facility … is not subject to audits of historical costs or revenues, or paybacks or retroactive adjustments based on these costs or revenues, except audits, paybacks, or adjustments relating to the cost report that is the basis for calculation of the first rate year under the contract.

The ALJ does not accept Sholom Home's argument that the above language exempts it from the audit that the Department conducted. The argument is neither factually not legally supportable. In making the audit adjustments, the Department did not review historical costs. Rather, it considered the facility's current rate as against its use of its property following delicensure.

The Department correctly notes that the rate adjustment allowed upon delicensure is actually outside the APS system of reimbursement. It applies to both Rule 50 and APS facilities.[32] Following delicensure, a rate reduction must be calculated if the facility fails to utilize property made available upon delicensure in one of the three facility operations methods described in the statute. Any audit of this calculation is not one of historical costs, but of a present rate determination.

The ALJ also agrees with the Department that the system implies the authority of the Department to audit the calculation of the facility's rate. Implicit in

[32] *See* Minn. Stat. § 256B.431 subd, 3a (c); subd. 30.

the Department's authority to reimburse as provided by law is its authority to conduct an audit to ensure compliance with the law.

Finally, the purpose of the audit exemption language applicable to APS facilities is to ensure that only the APS base year, which is established under Rule 50, is subject to audit of historical costs, not prior years. The statute is intended to fix a base year. It is not a blanket exemption from audit.

Does a Department change in statutory interpretation preclude the audit adjustments?

As discussed above, Sholom Home asserts that the Department's audit is barred because it changed its statutory interpretation after Sholom Home delicensed beds. This argument suggests factual issues about which there may be disputes, making summary disposition inappropriate.

In this case, there are no factual disputes relating to the vacant space. Prior to delicensure, the Department found there was no vacant space. Following delicensure, there was. Neither party disputes the existence or amount of that vacant space. Since vacant space was not an issue prior to delicensure,[33] there can be no claim of a change in the Department's position about it.

As to storage space, there are factual disputes. The Department allowed storage space both before and after delicensure. As noted above, prior to delicensure, Sholom Home had a right to re-license laid away beds. This justified storing equipment that might be used in the event of re-licensure. Following delicensure, the facility no longer had this right, bringing into question its rate calculation, which claimed in excess of 10,000 square feet of storage space for a facility that now had only 141 beds. Because of the factual change related to delicensure, it cannot be said that the Department has so clearly altered its position that summary disposition in favor of the facility is justified. In addition, Sholom Home has not shown that, if there were a change in position, it would be entitled to summary disposition as a matter of law.

Sholom Home argues forcefully the reasons for maintaining a large amount of storage space following delicensure. This argument is supported by affidavit.[34] Because this argument presents factual issues, an evidentiary hearing is appropriate.

[33] The facility had characterized space as vacant, but the Department auditor determined that the space was actually used for storage. Affid. of D. K. Krueger, Ex. A.

[34] *See* Affidavit of Barbara Ruppe ¶ 28.

Is the Department statutorily barred from implementing a rate decrease?

Sholom Home argues that it is entitled to summary disposition because the Department may only increase, not decrease, its rate. Sholom asserts that it never asked for a rate increase after delicensure, so that the provisions of subdivision 30 (h) may not be used to adjust its rate downward.

The ALJ rejects this argument. Subdivision 30 (h) requires that a reduction in the rate occur when, following layaways or delicensure, a facility fails to use property for nursing facility operations. The statute does not time-bar the Department from auditing for compliance with the statute. Here, the facility received a rate increase of $3.01, effective October 1, 2001, at the completion of an August 2002 audit.[35] After the facility delicensed beds in early 2003, the Department undertook another audit within a few months. Neither the law nor a statute bars such an audit.

Is the audit arbitrarily and unlawfully fixed in time, requiring summary disposition in favor of Sholom Home?

Sholom Home's final argument for summary disposition echoes its argument that the Department has insufficiently identified which space is vacant. Sholom again argues that a "snapshot" in time is not a sufficient basis for audit adjustments. This argument borders on fatuous. For a start, the Department asked to conduct its field audit in September 2003. At Sholom's request, the Department delayed the audit to mid-November 2003.[36] Sholom cannot seriously complain that the timing of the audit was arbitrary when it maintained control over the timing. Moreover, by its nature, any field audit is fixed in time. For this reason, the Department invites dialogue about audit issues and adjusts findings in light of that dialogue. That is what happened following the August 2002 audit.[37] In addition, at least with respect to vacant space, virtually nothing has changed between November 2003 and now. The audit conducted four years ago obviously captured more than a snapshot in time as to vacant space.

Finally, Sholom Home offers no legal support for the proposition that the Department is confined to a certain time period for audits. The statute mandates a rate reduction when a facility fails to use property freed up through delicensure for facility operations.[38] DHS had no authority to continue paying Sholom Home a rate to which it was not entitled. The mechanism for making that determination is an audit. As a matter of law, the Department was entitled to audit the facility.

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[35] *See* Affid. of D. K. Krueger ¶ 4-5, Ex. A.
[36] Affid. of D. K. Krueger ¶ 6.
[37] Affid. of D. K. Krueger ¶ 4-5, Ex. A.
[38] *See* Minn. Stat. § 256B.431, subd. 30 (h).

Conclusion

For the above reasons, the ALJ recommends summary disposition in favor of the Department as to the issue of vacant space. The remaining issue about storage space requires an evidentiary hearing which has been scheduled for December 10-11.

L. F. C.